Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

CLARK COUNTY SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

DERRICK EASON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a State-created entity should be denied Eleventh Amendment immunity, even though a judgment against it will be satisfied from and have a direct impact on State funds, simply because the judgment against the entity would not impose direct legal liability on the State itself.

PARTIES TO THE PROCEEDINGS

Petitioners include Clark County School District (hereinafter referred to as "Petitioner CCSD"), Robert T. Henry, Beverly J. Minnear, Woodard Macke, and Mila Kitt.

Respondents include Shawn Witte, a minor, by his next friend and parent, Teresa Witte, and Derrick Eason, a minor, by his next friend and parent, Serena Eason. Respondents filed the underlying civil actions in this matter.

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Petitioners respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The district court's opinions (per Roger L. Hunt, D.J.) granting Petitioners' motions to dismiss (Appendix ("Pet. App." 18a through 30a) are unpublished. The court of appeals' opinion (Raymond C. Fisher, C.J., joined by Stephen Reinhardt, C.J., and Donald W. Molloy, D.J.) reversing (Pet. App. 1a through 17a) is published at 303 F.3d 1137.

STATEMENT OF JURISDICTION

The Court of appeals entered its opinion and order on September 11, 2002. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the United States Constitution which states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

STATEMENT OF THE CASE

Respondents brought suit against Petitioners Clark County School District (hereinafter "Petitioner CCSD") and several of its employees in their individual and official capacities, including Robert T. Henry, Beverly J. Minnear, Woodard Macke, and Mila Kitt, alleging that Respondents were subjected to excessive corporal punishment while they attended Variety School. Variety School is a Nevada public school within the Clark County School District attended only by children with disabilities. Respondents attempt to state causes of action for: (1) violation of 42 U.S.C. § 1983 (alleging a violation of their constitutional right to substantive due process); (2) violation of 42 U.S.C. § 1983 (alleging a violation of their constitutional right to equal protection); (3) violation of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq.*; (4) violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*; (5) violation of NRS 392.465 (a Nevada statute prohibiting corporal punishment in Nevada's school system); (6) assault; and (7) battery. Respondents sought to establish jurisdiction in the district court in the first instance based upon 28 U.S.C. §§ 1331, 1343(a)(3), 1367 and 42 U.S.C. § 12188(a)(1).

Petitioners moved to dismiss Respondents' claims on the grounds that Petitioner CCSD was an arm of the State of Nevada and, therefore, entitled to Eleventh Amendment immunity from Respondents' claims. The district court agreed and dismissed Respondents' claims. In doing so, the district court rejected Respondents' argument that pursuant to *Regents of the University of California v. Doe*, 519 U.S. 425 (1997), Petitioner CCSD is not an arm of the State of Nevada because the State of Nevada was not legally obligated to satisfy a monetary judgment against Petitioner CCSD.

The district court further found that Petitioner CCSD was an arm of the State of Nevada because it was treated like a state agency by the State of Nevada.

The Ninth Circuit reversed the district court and cited *Regents of the University of California v. Doe*, for the proposition that the relevant inquiry "is whether Nevada will be legally required to satisfy any monetary judgment obtained against the District." The Ninth Circuit adopted this expansive interpretation of *Doe* despite the fact that opinion itself addressed only the narrow question of, "whether the fact that the Federal Government has agreed to indemnify a state instrumentality against the costs of litigation, including adverse judgments, divests the state agency of Eleventh Amendment immunity." *Doe*, 519 U.S. at 426 (holding that the entity was entitled to immunity). Notably, the Ninth circuit did not acknowledge the limited nature of *Doe*, nor did it properly consider the more general tests that this Court has announced for evaluating Eleventh Amendment immunity. *See, e.g., Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 45-51 (1994).

The court of appeals' holding merits this Court's immediate review because the Ninth Circuit's requirement that Petitioner CCSD establish that the State of Nevada is legally obligated to satisfy a judgment against it to be entitled to Eleventh Amendment immunity exemplifies the disarray within the circuits over the proper inquiry to determine Eleventh Amendment immunity. Further immediate review is warranted because the Ninth Circuit's holding directly conflicts with other circuits which do not require and precedent from this Court which does not require a showing of legal liability on the part of the State to qualify for Eleventh Amendment immunity. Finally, the Ninth Circuit's holding

creates a split within the Ninth Circuit itself by effectively denying Nevada school districts the same Eleventh Amendment protection afforded those in California.

Background of Petitioner CCSD

Education in Nevada is primarily a matter of state concern. Indeed, the Constitution of the State of Nevada requires the State of Nevada to provide for a uniform system of common schools. Nev. Const. Art. 11, § 2. The Nevada Constitution further requires that the Nevada Legislature provide for a superintendent of public instruction to oversee its public schools, and pass laws to secure the general attendance of its schools. Nev. Const. Art. 11, § 1. Thus, it is clear from the Nevada Constitution that education in Nevada is a central government function.

Under the laws of the State of Nevada, the State exercises pervasive control over each of Nevada's school districts, including Petitioner CCSD. The Nevada Legislature statutorily created each of the school districts in Nevada and proclaimed their purpose to be to "administer the state system of public education." NRS 386.010(2) (1967). The Nevada Legislature, by statute, controls the term, manner of election, salary, and number of the board of trustees for each Nevada school district. NRS 386.120, NRS 386.180, NRS 386.190, and NRS 386.320. The Nevada Legislature controls the procedures and conditions under which a pupil can be suspended or expelled. NRS 392.465. It controls the courses that are taught in its public schools. NRS 385.110. It mandates certain types of transportation each school district is required to provide. NRS 388.060. It requires each school district to set aside a period of silence each day. NRS 388.075. It sets the minimum number of days and instructions and recognized holidays for each school district. NRS 388.090. It mandates

the information each school district must provide to the residents of each district every year. NRS 385.347. It provides a comprehensive system whereby Nevada's department of education reviews and evaluates the performance of every individual public school and pursuant to which inadequately performing schools are held directly accountable by the state.[1] NRS 385.363. The Nevada Legislature sets the licensing and qualification requirements for teachers. NRS 391.060 *et seq*. It requires school districts to have written contracts with licensed personnel. NRS 391.120. It provides a comprehensive system each school district must follow in determining the salary of its teachers and other employees. NRS 391.160. It sets forth the grounds for which a teacher or administrator may be suspended, demoted or dismissed. NRS 391.312. It mandates and provides for the frequency of performance evaluations for employees. NRS 391.3125. The Nevada Legislature controls the number of charter schools each school district may authorize. NRS 386.510. It established a state controlled fund for school improvement administered by the state superintendent of public instruction. NRS 387.032. The Nevada Legislature mandates by statute the minimum amount of money each school district must spend per year for textbooks, library books and supplies, materials relating to instruction, as well as for maintenance and repair of equipment, vehicles and building and facilities. NRS 387.207.

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1. Schools evaluated as "demonstrating need for improvement" must submit a plan for improvement to the Governor of the State of Nevada, among others. NRS 385.371. Nevada's department of education is responsible for preparing and supervising a plan for improvement for schools designated by the State as "demonstrating need for improvement" for two or more consecutive years, in addition to establishing a nine-member panel to supervise the school. NRS 385.373, NRS 385.375, and NRS 385.378.

Additionally, the Nevada Legislature also exercises pervasive control over the funding of each Nevada school district. The Nevada Legislature's funding scheme for its school districts, referred to as the "Nevada Plan" sets forth a funding scheme where each school district is guaranteed a minimum level of funding from the State based upon such factors as enrollment and the wealth of the particular school district.

Under the Nevada Plan, the Nevada Legislature sets the amount of property tax to be collected by each county for the support of the public schools within the school district, that figure is then deducted from the basic guarantee for that particular school district as determined by the legislature, the remainder is provided to the school district from state funds deposited in the State distributive school account. NRS 387.122 (1967). As recognized by the Nevada Legislature,

> the key to the Nevada Plan is the total guaranteed support level, which guarantees a minimum amount of resources will be available for a school district. To a limited extent, school districts can generate additional revenues beyond the guaranteed level; however, school districts have very little discretion in tax revenues. They cannot assess additional local sales taxes or increase property tax beyond the rate mandated by the state, except for capital outlay or school safety. Although school districts can generate certain non-tax revenues (rent, sales, tuition), these comprise an insignificant portion of their total budgets.

The Nevada Legislature prohibits any other taxation as a source of revenue for a school district with the exception of

a possible property tax for the sole purpose of raising funds for "enhancing the safety and security of the public schools." NRS 387.197.

The Nevada Legislature also exercises pervasive control over its school districts' ability to raise funding by issuing bonds. In fact, there is no provision authorizing Petitioner CCSD to issue bonds to satisfy a monetary judgment against it. By statute, school districts can only issue general obligation bonds for construction, design and purchase of certain facilities, remodeling certain facilities, purchasing furniture and equipment for schools, purchasing or retrofitting motor vehicles, or other transportation. NRS 387.335. It also limits the total bonded indebtedness a county school district can attain. NRS 387.400. The Nevada Legislature permits school districts to authorize medium term obligations for the purpose of meeting a great necessity. NRS 387.305. However, the executive director of the state department of taxation must approve such an obligation. NRS 350.089.

Based upon the pervasive control the State of Nevada exercises over Petitioner CCSD, Petitioners moved for dismissal of Respondents claims pursuant to the Eleventh Amendment. In the Ninth Circuit, whether an entity is an arm of the state for purposes of the Eleventh Amendment depends upon: (1) whether a money judgment would be satisfied out of state funds; (2) whether the entity performs central governmental functions; (3) whether the entity may sue or be sued; (4) whether the entity has the power to take property in its own name or only the name of the state and; (5) the corporate status of the entity. *Mitchell v. Los Angeles*, 861 F.2d 198 (9th Cir. 1989).

Petitioners argued that the first and most important factor – whether a money judgment would be satisfied out of state funds – counseled strongly in favor of finding Petitioner CCSD to be an arm of the state because: (1) the funds available to satisfy a judgment were state funds under Ninth Circuit precedent, that is, funds received directly from the state commingled with revenue from property tax mandated and controlled by the State of Nevada; and (2) the State of Nevada so controlled and limited Petitioner CCSD's ability to satisfy a judgment that the state funds were practically impacted. *See Belanger v. Madera Unified School Dist.*, 963 F.2d 248, 251-52 (9th Cir. 1992) (holding that locally raised funds commingled with state funds must be considered to be state funds and funding from property tax revenue raised pursuant to a state plan for school funding must also be considered state funds). The Ninth Circuit rejected these arguments finding that Petitioners were required to show that the State of Nevada would be legally obligated to satisfy a judgment against Petitioner CCSD.

REASONS FOR GRANTING THE PETITION

In recent years this Court has devoted a substantial amount of its time to the important issue of sovereign immunity and when Congress has validly abrogated states' sovereign immunity such that they can be sued in Federal Court. For example, this Court held that Congress did not have authority to validly abrogate states' sovereign immunity under the Fair Labor Standards Act in *Maine v. Alden*, 527 U.S. 706 (1997), under the Age Discrimination in Employment Act in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), under Title I of the Americans With Disabilities Act in *Alabama v. Garrett*, 531 U.S. 356 (2001), and is currently considering whether the Family Medical

Leave Act is a valid abrogation of states' sovereign immunity in *Nevada Department of Human Resources v. Hibbs*, Case No. 01-1368. However, while the Court has recently handed down several decisions detailing the scope and breath of the Eleventh Amendment, there has been no definitive guidance from this Court as to when an agency is so closely related to or directed by a state that it shares in that state's sovereign immunity. The consequence is that agencies such as Petitioner CCSD are left with confusing and conflicting appellate decisions applying the piece meal guidance that has been provided by this Court on the arm of the state doctrine and no clear guidance as to whether they are subject to such important legislation as the ADA, FLSA and ADEA. In view of the constitutional impact of these cases, it is of paramount importance that States have clear guidance as to when its agencies are entitled to immunity under the Eleventh Amendment.

Based upon the foregoing, this petition should be granted for two reasons. First, this petition should be granted because there exists no clear uniform standard to determine whether an agency, such as Petitioner CCSD, should be considered to be an arm of the state entitled to Eleventh Amendment immunity. Consequentially, the circuit courts apply a number of varying and often inconsistent multi-factored tests resulting in a situation where whether an agency is found to be entitled to Eleventh Amendment immunity depends more upon its geographic location than the merits of the case. Although the Ninth Circuit found Petitioner CCSD was not entitled to Eleventh Amendment immunity, it almost certainly would be entitled to such immunity in other circuits. This is clearly a circumstance that should not be tolerated.

Second, this petition should be granted because the Ninth Circuit like at least one other circuit, has incorrectly interpreted this Court's decision in *Regents of the University of California v. Doe*. Those two circuit courts have held that under *Regents of the University of California v. Doe*, whether the State is "legally obligated" to satisfy a judgment against the agency in question is the determinative factor in applying Eleventh Amendment immunity. This holding not only clearly exceeds the intent and holding in *Regents of the University of California v. Doe* but it also conflicts with this Court's holdings in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 45-51 (1994) and *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 93-94 n.34 (1984). Moreover, this interpretation of *Regents of the University of California v. Doe* also creates a conflict amongst the circuit courts. The majority of circuits have interpreted the appropriate inquiry as whether a monetary judgment against the entity would have a practical or legal impact upon state funds. The result of this misinterpretation is that entities such as Petitioner CCSD are denied their constitutional right to Eleventh Amendment immunity. Relatedly, this petition should be granted because the Ninth Circuit's holding requiring Petitioner CCSD to establish that the State of Nevada is legally obligated to pay a judgment against it liability effectively deprives Nevada's school districts of the Eleventh Amendment protection afforded by the Ninth Circuit to California school districts in prior decision creating an intra-circuit conflict.

1. Certiorari Is Warranted Because Almost All Of The Circuits Have Adopted Their Own Unique Tests For Assessing The Eleventh Amendment Immunity Of Political Subdivisions, And This Court Should Provide A Uniform Test So That All State Entities Receive The Same Constitutional Protection.

The concept of the sovereignty of the States and their agencies and instrumentalities is a fundamental rule of jurisprudence having an important bearing upon the construction of the Constitution of the United States. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98 (1984). The particular question of whether a state agency or instrumentality is an arm of the state for purposes of Eleventh Amendment immunity is a question of federal law. *Regents of the University of California v. Doe*, 519 U.S. 425, 430 n.5 (1997). Despite its vital importance, federal court jurisprudence regarding how to apply the arm of the state doctrine for purposes of Eleventh Amendment immunity is recognized as being confusing, at best. *See Mancuso v. NYS Thruway Authority*, 86 F.3d 289, 293 (2d Cir. 1996) ("The jurisprudence over how to apply the arm of the state doctrine is, at best, confused.") and *Duke v. Grady Municipal Schools*, 127 F.3d 972, 980 (10th Cir. 1997) (recognizing that confusion exists in the area of Eleventh Amendment jurisprudence). This Court has never provided the circuit courts with definite guidance as to the factors relevant to determining when an entity is an arm of the state for purposes of Eleventh Amendment immunity.

The result of the piecemeal guidance that has been provided by the Court is the proliferation of varying multi-factored and sub-factored tests by most of the circuits and an inconsistent application of those factors in a manner

creating conflict among the appellate courts and with the precedent of this Court. This unnecessarily has led to an unacceptably imprecise and incorrect analysis of when an entity is entitled to Eleventh Amendment immunity. In this matter, the result is that despite the pervasive control and funding of Petitioner CCSD by the State of Nevada, it was wrongfully denied Eleventh Amendment immunity.

The most comprehensive guidance on this topic from this Court appeared in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). The extent of this guidance was that the Court stated that the issue of whether the Mt. Healthy Board of Education is to be treated as an arm of the state "depends, at least in part, upon the nature of the entity crated by state law." In finding the Board was not entitled to immunity, the Court noted that the Board was defined by state law as a "political subdivision" and under Ohio law the State did not include "political subdivisions." The Court also noted that the Board was subject to some guidance from the State Board of Education and received a significant amount of money from the State, but that it had extensive powers to issue bonds and levy taxes.

Based largely upon *Mt. Healthy*, the following multi-factored tests have been developed by the circuits:

The First Circuit looks at: (1) whether the agency has the funding power to enable it to satisfy judgments without direct state participation or guarantees; (2) whether the agency's function is governmental or proprietary; (3) whether the agency is separately incorporated; (4) whether the state exerts control over the agency, and if so, to what extent; (5) whether the agency has the power to sue, be sued, and enter contracts in its own name and right; (6) whether the

agency's property is subject to state taxation; and (7) whether the state has immunized itself from responsibility for the agency's acts or omissions. *Wojcik v. Massachusetts State Lottery Commission*, 300 F.3d 92 (1st Cir. 2002).

The Second Circuit looks at: (1) how the entity is referred to in the documents that created it; (2) how the governing members of the entity are appointed; (3) how the entity is funded; (4) whether the entity's function is traditionally one of local or state government; (5) whether the state has a veto power over the entity's actions; and (6) whether the entity's obligations are binding on the state. *Mancuso v. NYS Thruway Authority*, 86 F.3d 289, 293 (2d Cir. 1996).

The Third Circuit looks at: (1) the source of funding; (2) the status of the agency under state law; and (3) the degree of autonomy from state regulation. *Carter v. City of Philadelphia*, 181 F.3d 339 (3d Cir. 1999). The Third Circuit rejected whether the functions performed by the entity were typically state or local functions despite that various other circuits consider this factor because this Court found that factor to be unhelpful in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994).

The Fourth Circuit considers whether a judgment against the governmental entity would have to paid from the State's treasury and, if not, if the judgment would adversely affect the dignity of the State as a sovereign consisting of the consideration of: (1) the degree of control that the State exercises over the entity or the degree of autonomy from the State that the entity enjoys; (2) the scope of the entity's concerns – whether local or statewide – with which the entity is involved; and (3) the manner in which State law treats the entity. *Cash v. Granville County Board of Education*, 242 F.3d 219, 224 (4th Cir. 2001).

The Fifth Circuit considers: (1) whether the state statutes and case law view the entity as an arm of the state; (2) the source of the entity's funding; (3) the entity's degree of local autonomy; (4) whether the entity is concerned primarily with local as opposed to statewide problems; (5) whether the entity has the authority to sue and be sued in its own name; and (6) whether it has the right to hold and use property. *Southwestern Bell Telephone Company v. City of El Paso*, 243 F.3d 936, 938 (5th Cir. 2001).

The Sixth Circuit has no clearly enunciated factors.

The Seventh Circuit considers the extent of the entity's financial autonomy from the state which is determined by looking at: (1) the extent of state funding; (2) the state's oversight and control over the entity's fiscal affairs; (3) the entity's ability to independently raise funds; (4) whether the state taxes the entity; and (5) whether a judgment against the entity would result in the state increasing its appropriations to the entity, in addition to the entity's nature and general legal status, whether the entity's governing council or board of trustees are selected by the state Governor; what powers are granted to the entity, what power and control the state retains over the entity, and the primary purpose of the entity – to serve the whole state or only a region of the state. *Strykowski v. Northeast Illinois Regional Commuter Railroad Corp.*, 1994 U.S. App. LEXIS 16236 *9 (7th Cir. June 28, 1994) and *Kashani v. Purdue University*, 813 F.2d 843, 845-48 (7th Cir. 1987).

The Eighth Circuit considers nine factors: (1) local law and decisions defining the status and nature of the agency involved in its relation to the sovereign; (2) most importantly, whether the payment of the judgment will have to be made

out of the state treasury; (3) whether the agency has the funds or the power to satisfy the judgment; (4) whether the agency is performing a governmental or proprietary function; (5) whether it has been separately incorporated; (6) the degree of autonomy over its operations; (7) whether it has the power to sue and be sued and to enter into contracts; (8) whether its property is immune from state taxation; and (9) whether the sovereign has immunized itself from responsibility for the agency's operations. *Sherman v. Curators of the University of Missouri*, 16 F.3d 860, 865 (8th Cir. 1994).

The Ninth Circuit considers: (1) whether a money judgment would be satisfied out of stated funds; (2) whether the entity performs central governmental functions; (3) whether the entity may sue or be sued; (4) whether the entity has the power to take property in its own name or only the name of the state; and (5) the corporate status of the entity. *See Mitchell v. Los Angeles Community College District*, 861 F.2d 198, 201 (9th Cir. 1988). In *Eason v. Clark County School District*, the Ninth Circuit converted the first factor into an inquiry as to whether the State is legally obligated to satisfy a judgment against the entity. 303 F.3d 1137, 1142 (9th Cir. 2002).

The Tenth Circuit considers: (1) the degree of state control; (2) the characterization and definition of the entity in its enabling and implementing legislation; (3) state court interpretations and characterization of the entity; (4) the functions of the entity; (5) the fiscal independence of the entity; and (6) and the legal liability of the state for the entity's debts. *Duke v. Grady Municipal Schools*, 127 F.3d 972, 978 (10th Cir. 1997).

The Eleventh Circuit looks at: (1) how state law defines the entity; (2) what degree of control the State maintains over the entity; and (3) from where the entity derives its funds and who is responsible for judgments against the entity. *Shands Teaching Hospital and Clinics, Inc. v. Beech Street Corp.*, 208 F.3d 1308, 1311 (11th Cir. 2000).

As evidenced by the foregoing, there is a glaring lack of consistency in the factors relevant to determining whether an entity is an arm of the State for Eleventh Amendment immunity purposes. For example, the Fourth and Fifth Circuits consider important whether the entity performs traditionally state or local functions, while the Third Circuit has expressly rejected this topic as a relevant inquiry. In addition, the Fourth and Seventh Circuits look at whether the scope of the entity's authority is statewide or only regional. Meanwhile, while in most circuits it is relevant whether the entity at issue can hold property in its own name, in the First and Eighth Circuits it is important to look at whether the entity's property is subject to taxation by the State. Also, the Second and Seventh Circuits are the only circuits to expressly name how the governing entities are appointed as a factor and in the Seventh Circuit, the inquiry is specifically whether the governing members are appointed by the Governor. Additionally, the Third, Fifth, Seventh and Eleventh Circuits expressly include the source of the entity's funding as a factor under the arm of the state doctrine.

Faced with such varying and inconsistent standards, the circuit courts often heavily rely upon dicta for their ultimate determinations as to whether an entity is an arm of the state. For example, here the Ninth Circuit concluded that Petitioner CCSD was not an arm of the state based upon the fact that:

> The Supreme Court has mentioned in passing that the Eleventh Amendment does not afford "local school boards" immunity from suit, *Missouri v. Jenkins*, 495 U.S. 33 n.20, 109 L. Ed. 2d 31, 110 S. Ct. 1651 (1990), and in *Mt. Healthy*, the Court held an Ohio school district subject to suit because it was "more like a county or city than . . . like an arm of the State."

Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 280 (1977). Clearly this unacceptably elevates form over substance. Additionally, the Ninth Circuit ignored the fact that not only is Petitioner CCSD funded primarily by direct and indirect state funds but that the State of Nevada is constitutionally and statutorily obligated to provide a specific minimum level of funding and support. *See Belanger v. Madera Unified School Dist.*, 963 F.2d 248, 252 (9th Cir. 1992) (holding that locally raised funds subject to state control (such as property taxes) commingled with state funds must be considered to be state funds and funding from property tax revenue raised pursuant to a state plan for school funding must also be considered state funds). The issue of whether the entity is funded by the state or self-sustaining is of paramount importance to other circuits. *See Carter v. City of Philadelphia*, 181 F.3d 339, 348 (3d Cir. 1999) (finding the most important factor to be the source of funding for the entity). As a consequence, despite that entitlement to Eleventh Amendment immunity is a question of federal law, the practical result of the lack of guidance from this Court is that whether Petitioner CCSD is an arm of the state likely differs in different circuits. This is clearly an unacceptable result and additionally warrants review by this Court.

2. Certiorari Is Warranted In This Case Because The Ninth Circuit's Expansive Application Of *Doe* Deepens A Circuit Split On The Proper Test For Determining Whether A Political Subdivision Of The State Is Entitled To Eleventh Amendment Immunity.

a. Through Its Expansive Application Of *Doe*, The Ninth Circuit Has Adopted A Position That Is Inconsistent With Both This Court's General Precedent And The Specific Holdings Of Other Circuit Courts.

This petition should further be granted because the Ninth Circuit erroneously interpreted Regents of the *University of California v. Doe* by requiring that Petitioners establish that the State of Nevada was legally obligated to satisfy a judgment against Petitioner CCSD depriving Petitioners of their Constitutional right to immunity from this matter. It is generally agreed amongst this Court and the circuit courts that the most important factor in determining whether an entity is an arm of the state for Eleventh Amendment purposes is whether a monetary judgment would have a practical effect on the state treasury. *See Regents of the University of California v. Doe*, 519 U.S. 425, 430 (1997) (finding this factor to be of "considerable importance" to any evaluation of the relationship between the State and the entity being sued). In *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 45-51 (1994), this Court clearly indicated that the appropriate inquiry under this factor is whether the state was "practically" or "legally" obligated to pay a monetary judgment against the state instrumentality. In furtherance of this inquiry in *Hess*, this Court examined whether the entity at issue was structured to be self-sustaining or dependent upon the state for funding. *Id.* at 261. Additionally, in

Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 93-94 n.34 (1984), this Court considered as relevant to this inquiry the fact that funding for the county mental retardation program at issue came almost entirely from the State.

More recently, in *Regents of the University of California v. Doe*, this Court addressed the related issue of whether the fact that state funds were not vulnerable to a money judgment based upon an indemnification agreement or insurance coverage weighed against finding Eleventh Amendment immunity and held:

> with respect to the underlying Eleventh Amendment question, it is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant.

There is no indication in *Doe* that the Court meant to direct federal courts to disregard the "practical" impact of a judgment upon state funds as it considered in *Hess* and *Pennhurst*. In fact, this Court specifically stated that the narrow question it was deciding was whether the fact that a third party agreed to indemnify an entity for any monetary judgment against it deprived the entity of its Eleventh Amendment immunity. Yet at least two circuit courts since *Doe*, including the Ninth Circuit resulting in this petition, interpreted *Doe* to hold that the relevant inquiry as to whether a monetary judgment would implicate State funds depends solely on whether the State is legally obligated to satisfy a monetary judgment.

In the present case, the Ninth Circuit unequivocally adopted this unwarranted and erroneous interpretation of *Doe*:

> The Supreme Court stressed in *Regents of the University of California* that "it is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant . . . Thus, the relevant inquiry is whether Nevada will be legally required to satisfy any monetary judgment obtained against the District."

Eason, 303 F.3d at 1142. The Ninth Circuit ultimately went on to find that this "most important factor" mitigated against finding Petitioner CCSD entitled to Eleventh Amendment immunity because Petitioners could not "demonstrate the State of Nevada bears a legal obligation to satisfy any adverse judgment against the District." *Id.* at 1144.

The Tenth Circuit also incorrectly interprets *Regents of the University of California*:

> We interpret *Doe* to require us to focus on legal liability for a judgment, rather than practical, or indirect, impact a judgment would have on a state treasury. As the Court specifically stated, "it is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant." And while such a focus in some ways ignores economic reality, it also provides a clear and workable test in this very

> confused area of the law. It directs courts away from having to make case by case fact specific determinations of the practical impact on state treasuries."

Duke v. Grady Municipal Schools, 127 F.3d 972, 981 (10th Cir. 1997). The Tenth Circuit clearly interpreted *Doe* to mean that the most important factor to determine whether an entity is an arm of the State is whether the State is legally obligated to satisfy a monetary judgment against the entity. As a consequence, the Tenth Circuit in *Duke* found that the issue of the effect of a monetary judgment against the school district at issue in that case mitigated against finding it entitled to Eleventh Amendment immunity even though the Tenth Circuit recognized that it received 95% of its funding from the State and had no independent fundraising ability to satisfy a monetary judgment against it. *Duke*, 127 F.3d at 980.

The Ninth and Tenth Circuits' interpretation of *Doe* can only be read to reject the practical impact of a monetary judgment on State funds as an appropriate inquiry when determining whether an entity is entitled to Eleventh Amendment immunity. Such an interpretation directly conflicts with *Hess*, *Pennhurst* and the majority of other circuit courts. *See Mancuso v. NYS Thruway Authority*, 86 F.3d 289, 293 (2d Cir. 1996) (considering whether the entity at issue is legally obligated to satisfy a judgment, how the entity is funded, and whether a monetary judgment places the state treasury at risk); *Southwestern Bell Telephone Company v. City of El Paso*, 243 F.3d 936, 938 (5th Cir. 2001) (considering both the practical and legal effect of a judgment upon state funds including whether the majority of the entity's funding comes from the state);

Kashani v. Purdue University, 813 F.2d 843, 845-48 (7th Cir. 1987) (analyzing: (1) the extent of state funding; (2) the state's oversight and control over the entity's fiscal affairs; (3) the entity's ability to independently raise funds; (4) whether the state taxes the entity; and (5) whether a judgment against the entity would result in the state increasing its appropriations to the entity) and *Shands Teaching Hospital and Clinics, Inc. v. Beech Street Corp.*, 208 F.3d 1308, 1311 (11th Cir. 2000) (considering from where the entity derives its funds and who is responsible for judgments against the entity).

Here, it is clear that any monetary judgment would have to be satisfied by State funds. The only funds available to satisfy a judgment are funds received directly from the State of Nevada commingled with revenue from property taxes, which because the property tax is mandated and controlled by the Nevada Legislature must also be considered to be State funds. *Belanger v. Madera Unified School Dist.*, 963 F.2d 248, 251-52 (9th Cir. 1992).

b. Through Its Novel Expansion of Doe, The Ninth Circuit Has, In Fact, Contradicted Its Own Precedent And Effectively Denied Nevada School Districts The Same Immunity Provided To California School Districts.

Additionally, this petition should be granted because the Ninth Circuit's holding creates an anomalous situation whereby its holdings grant California school districts Eleventh Amendment protection, but do not provide that same protection to the equivalently situated Nevada school districts. In *Belanger*, the Ninth Circuit held that the funding scheme of California school districts was so pervasively

controlled by the State that they were entitled to Eleventh Amendment immunity. This holding was based upon its conclusion that any local funds raised as part of the State's general funding plan for its school districts when "commingled" with funds received directly from the State lost their local characteristic and had to be considered State funds. *Belanger*, 963 F.2d at 252. The holding was further based upon its finding that local property taxes raised pursuant to California's funding scheme for its school districts also had to be considered to be State funds because the State has complete control over the amount of property tax revenue the school districts can raise and that revenue is simply credited toward the funding allocation from the State for each school district. *Id.* Nevada school districts, including Petitioner CCSD, are in an identical situation. The "local" funds they are allowed to raise as controlled by Nevada's funding scheme for school districts are commingled with funds received directly from the State of Nevada. Moreover, the State of Nevada has sole control over the amount of property tax Nevada School Districts can receive and simply uses that amount as a credit towards the amount of direct funding each Nevada school district will receive from the State. Notwithstanding these virtually identical circumstances, the Ninth Circuit's holding in this case deprives Nevada school districts of the Eleventh Amendment protection afforded California solely based upon its adoption of an improper interpretation of *Doe*.

Accordingly, the need for resolution of the conflict between the circuits regarding the appropriate inquiries as to whether a monetary judgment against the entity will be satisfied out of state funds and correction of the Ninth and Tenth Circuits misinterpretation of *Regents of the University of California v. Doe* warrants the Court's review of this matter.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED SEPTEMBER 11, 2002

United States Court of Appeals,
Ninth Circuit.

Nos. **00-17370**, 00-17377, 01-15692 and 01-15749.

Derrick EASON; Serena Eason,

Plaintiffs-Appellants,

v.

CLARK COUNTY SCHOOL DISTRICT;
Robert T. Henry; Mila Kitt; Beverly J. Minnear,

Defendants-Appellees.

Derrick Eason; Serena Eason,

Plaintiffs-Appellants,

v.

Clark County School District; Robert T. Henry;
Mila Kitt; Beverly J. Minnear,

Defendants-Appellees.

Shawn Witte, a Minor, by his next friend and
Parent, Teresa Witte,

Plaintiff-Appellant,

Appendix A

and

Teresa Witte,

Plaintiff,

v.

Clark County School District; Robert T. Henry;
Macke Woodard; Beverly J. Minnear,

Defendants-Appellees.

Shawn Witte, a Minor, by his next friend and
Parent, Teresa Witte,

Plaintiff-Appellant,

and

Teresa Witte,

Plaintiff,

v.

Clark County School District; Robert T. Henry;
Macke Woodard; Beverly J. Minnear,

Defendants-Appellees.

Appendix A

Argued and Submitted Feb. 11, 2002.

Filed Sept. 11, 2002.

Before: *REINHARDT* and *FISHER*, Circuit Judges, and *MOLLOY*, District Judge.*

FISHER, Circuit Judge:

Shawn Witte and Derrick Eason appeal the dismissal of their actions alleging severe abuse and excessive corporal punishment inflicted by educators at Variety School, a public school attended exclusively by students with disabilities, in Nevada's Clark County School District ("District"). Shawn and Derrick both sued the District and individual District personnel for violations of their constitutional rights to substantive due process and equal protection under § 1983, the Rehabilitation Act, the Americans with Disabilities Act and state law. In both cases, the district court held that all defendants were entitled to Eleventh Amendment immunity, dismissed all claims and taxed costs against Shawn and Derrick. We reverse the dismissal of the § 1983 and state law claims against all defendants, as well as the ADA and Rehabilitation Act claims against the District, because the Clark County School District is not an "arm of the state" and therefore does not enjoy Eleventh Amendment immunity. Plaintiffs do not appeal the dismissal of the ADA and Rehabilitation Act claims against the individual defendants.

* The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

Appendix A

FACTUAL & PROCEDURAL BACKGROUND

Witte v. Clark County School District

Shawn Witte, who is about 13 years old, has been diagnosed with Tourette syndrome, asthma, attention deficit hyperactivity disorder and emotional problems. For about three years, he attended Variety School, a public school in Nevada's Clark County School District attended exclusively by students with disabilities. He alleges that he "suffered repeated physical, psychological and verbal abuse at the hands of District personnel pursuant to policies either approved by the District or ratified by the District's failure to take action." The alleged severe pattern of abuse included the following: Shawn was force fed oatmeal, to which he is allergic, as well as oatmeal mixed in with his own vomit; he was strangled so he would run faster despite a physical deformity in his feet and legs; he was often subjected to the painful "take down procedure," in which he was pinned to the ground, his arms and legs forcibly crossed behind him, while a teacher applied pressure to his buttocks or spine; he was forced to run at high speeds on a treadmill with weights tied to his ankles; his food was thrown away if he did not use utensils properly; and he was squirted with water if unable to stay on task for long periods of time.

On March 2, 1998, Shawn, by his next friend and parent, Teresa Witte, sued the Clark County School District; Robert T. Henry, Director of Program Development in the District; Beverly J. Minnear, principal of Variety School, and Woodard Macke, a classroom teacher at Variety School, for violations of his constitutional rights to substantive due process and

equal protection under 42 U.S.C. § 1983; § 504 of the Rehabilitation Act of 1973, *as amended*, 29 U.S.C. § 794; Title II of the Americans with Disabilities Act, 42 U.S.C. § 1231 *et seq.* and state law.

The district court dismissed all claims against all defendants on the ground that defendants were immune from suit in federal court under the Eleventh Amendment and subsequently awarded costs of $6,879.87 to defendants.[1] Shawn timely appealed both orders.

Eason v. Clark County School District

Derrick Eason, who is about 12 years old, has been diagnosed with autism, cognitive impairment and attention deficit hyperactivity disorder. He attended Variety School from 1992, when he was three, to August 1997. Like Shawn, Derrick alleges that he suffered severe abuse at the hands of Variety School and District personnel, including being subjected to the "take down" procedure, being sprayed in the face with refrigerated water, being forced to run or walk on the treadmill with weights on his ankles or around a table continuously, having the teacher scream degrading comments at him, having numbing or noxious solutions applied to his mouth and lips to prevent him from biting himself and having vinegar put in his food.

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1. The district court had previously dismissed the complaint, but we reversed in *Witte v. Clark County School Dist.*, 197 F.3d 1271 (9th Cir.1999).

Appendix A

Derrick, by his next friend and parent, Serena Eason, also sued the District, Henry, Minnear and Mila Kitt, Derrick's teacher during the 1995-96 and 1996-97 school years. The district court dismissed all claims against all defendants on the basis of Eleventh Amendment immunity and later awarded costs of $8,484.62 to defendants. Derrick timely appealed both orders.

STANDARD OF REVIEW

We review de novo the district court's Rule 12(b)(6) dismissal, "accepting as true all well-pleaded allegations of fact in the complaint and construing them in the light most favorable to the plaintiffs." *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir.2001). "We review de novo the issue of whether a party is immune from suit under the Eleventh Amendment." *Sofamor Danek Group v. Brown*, 124 F.3d 1179, 1183 n. 2 (9th Cir.1997).

ANALYSIS

I.

The Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. The amendment has been construed to bar suits by citizens against their own states, *Papasan v.*

Allain, 478 U.S. 265, 276, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986); *Pennhurst v. Halderman*, 465 U.S. 89, 100, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984); *Hans v. Louisiana*, 134 U.S. 1, 18, 10 S.Ct. 504, 33 L.Ed. 842 (1890), and "[i]t has long been settled that the reference to actions 'against one of the United States' encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agencies and state instrumentalities." *Regents of the Univ. of Calif. v. Doe*, 519 U.S. 425, 429, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997) (citations omitted) (holding that California state university enjoys Eleventh Amendment immunity). In contrast, the Eleventh Amendment does not extend to counties and municipal corporations. *Lincoln County v. Luning*, 133 U.S. 529, 10 S.Ct. 363, 33 L.Ed. 766 (1890) (holding that Nevada counties are not immune under the Eleventh Amendment); *see also Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979) ("But the Court has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.' "). *Cf. Moor v. County of Alameda*, 411 U.S. 693, 717-719, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973) (holding that California counties are not arms of the state or alter egos of the state for purposes of diversity jurisdiction), *overruled in part by Monell v. Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (overruling holding of *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), that local governments are immune from suit under § 1983).

Appendix A

The central question in this case is whether the Clark County School District is an "arm of the state," entitled to Eleventh Amendment immunity. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). The Supreme Court has mentioned in passing that the Eleventh Amendment does not afford "local school boards" immunity from suit, *Missouri v. Jenkins*, 495 U.S. 33, n. 20, 110 S.Ct. 1651, 109 L.Ed.2d 31 (1990), and in *Mt. Healthy*, the Court held an Ohio school district subject to suit because it was "more like a county or city than . . . like an arm of the State." *Id.* at 280, 97 S.Ct. 568. Moreover, most courts have held that school districts are not entitled to Eleventh Amendment immunity.[2]

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2. *See, e.g., Cuesta v. School Board of Miami-Dade County*, 285 F.3d 962, 966 (11th Cir.2002) (Florida); *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219 (4th Cir.2001) (North Carolina); *Duke v. Grady Municipal Schools*, 127 F.3d 972 (10th Cir.1997) (New Mexico); *Ambus v. Granite Bd. of Educ.*, 995 F.2d 992 (10th Cir.1993) (Utah); *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1509-11 (11th Cir.1990) (Alabama); *Lester H. v. Gilhool*, 916 F.2d 865, 870-71 (3d Cir.1990) (Pennsylvania); *Rosa R. v. Connelly*, 889 F.2d 435, 437-38 (2d Cir.1989) (Connecticut); *Lopez v. Houston Independent School Dist.*, 817 F.2d 351, 353 (5th Cir.1987) (citing *Kingsville Independent School Dist. v. Cooper*, 611 F.2d 1109, 1112 (5th Cir.1980)), *overruled on another ground by Walton v. Alexander*, 44 F.3d 1297 (5th Cir.1995); *Fay v. South Colonie Central School Dist.*, 802 F.2d 21, 27 (2d Cir.1986) (New York); *Minton v. St. Bernard School Bd.*, 803 F.2d 129, 131-32 (5th Cir.1986) (Louisiana); *Gary A. v. New Trier High School Dist. No. 203*, 796 F.2d 940, 945 (7th Cir.1986) (Illinois); *Stoddard v. School Dist. No. 1, Lincoln County*, 590 F.2d 829 (10th Cir.1979) (Wyoming); *Unified School Dist. No. 480 v. Epperson*, 583 F.2d 1118, 1121-23 (10th Cir.1978) (Kansas); *Adams v. Rankin County Bd. of Educ.*, 524 F.2d 928, 929

(Cont'd)

Appendix A

In *Mitchell v. Los Angeles*, 861 F.2d 198 (9th Cir.1989), we articulated five factors to determine whether an agency is an arm of the state: (1) "whether a money judgment would be satisfied out of state funds," (2) "whether the entity performs central governmental functions," (3) "whether the entity may sue or be sued," (4) "whether the entity has the power to take property in its own name or only the name of the state" and (5) "the corporate status of the entity." *Id.* at 201. We consider each of these factors in turn.

The first *Mitchell* factor—whether a money judgment will be satisfied out of state funds—is the most important. *See e.g.*, *Edelman v. Jordan*, 415 U.S. 651, 663, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Belanger v. Madera Unified School Dist.*, 963 F.2d 248, 251 (9th Cir.1992); *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 (9th Cir.1991); *Jackson v. Hayakawa*, 682 F.2d 1344 (9th Cir.1982). The Supreme Court stressed in *Regents of the University of California* that "it is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant." 519 U.S. at 431, 117 S.Ct. 900 (finding irrelevant the fact that the federal government would indemnify the State of California for any damages judgment against the University); *see also Durning*, 950 F.2d at 1424 n. 2 ("The relevant question is whether the state would have a *legal liability* to pay the judgment, not whether the defendant entity would have the *practical ability* to pay it."); *Duke*, 127 F.3d at 981

(Cont'd)

(5th Cir.1975) (Mississippi). *But see Belanger v. Madera Unified School Dist.*, 963 F.2d 248 (9th Cir.1992) (California); *De Levay v. Richmond County School Bd.*, 284 F.2d 340 (4th Cir.1960) (Virginia).

(concluding that the "factor relating to the liability of the state treasury points away from Eleventh Amendment immunity, for the simple reason that the state of New Mexico is not *legally* liable for a judgment against a school district[,]" even though New Mexico schools receive about 95% of their funds from the state). Thus, the relevant inquiry is whether Nevada will be legally required to satisfy any monetary judgment obtained against the District.

No statutory provision requires Nevada to satisfy its school districts' debts, but defendants cite *Belanger*, where we granted California school districts Eleventh Amendment immunity, and contend that, as in California, state funds will necessarily satisfy any monetary judgment against the school district. In *Belanger*, however, we recognized that "California has selected a different path from that of most states." 963 F.2d at 254. *Belanger* is thus distinguishable because Nevada does not share the unique structure of the California school system. In California:

> The state sets a revenue limit for each school district based on average attendance, subtracts property tax revenues from that limit, and allocates the balance to the school district from the state school fund. In short, the state determines the amount of money that school districts may spend per pupil and then provides the necessary state funds.

Id. at 252 (citations omitted). By virtue of this revenue limit system, "state and local revenue is commingled in a single fund under state control, and local tax revenue lost to a judg-

ment must be supplanted by the interchangeable state funds already in the district budget." *Id.* Thus, in California, "any use of the commingled funds is a use of state funds." *Id.*

In contrast, even though Nevada school districts receive state funding, local funds lost to satisfy a money judgment will not necessarily be replaced with state funds. The State of Nevada does not set a maximum limit on per pupil spending. Instead, it establishes a minimum amount to be spent per pupil—known as the basic support guarantee—and it uses state funds to guarantee that each district will have that minimum amount. This funding scheme is entitled "The Nevada Plan." *See* "The Nevada Plan for School Finance: An Overview" at 2, 4 (hereinafter "Nevada Plan Overview");[3] Nev.Rev.Stat. §§ 387.121 (defining generally The Nevada Plan); 387.122 ("Establishment of basic support guarantees"); 387.1233 ("Calculation of basic support"). The amount of money contributed by the state varies by school district—school districts are required to earmark certain locally generated revenue to the minimum budget, this locally

3. Defendants object to the plaintiffs' introduction of this document, a report prepared by the Legislative Counsel Bureau, a Nevada state agency, for the first time on appeal. The case they cite, *Sablan v. Dept. of Finance*, 856 F.2d 1317 (9th Cir.1988), is inapposite because it merely reiterates the familiar proposition that we will not entertain new *arguments* on appeal. *Id.* at 1327. By bringing the Nevada Plan Overview to our attention, plaintiffs do not attempt to craft a new legal argument. Rather, they seek to bolster their description of the Nevada school system by introducing a supporting administrative report. We fail to see how this is improper—defendants do not suggest that this document is an unofficial record or otherwise inaccurate. In any event, we do not use the Nevada Plan Overview to resolve any disputed issues of fact.

generated revenue is subtracted from the state guaranteed basic support and the difference (if there is any) is provided by the state. Nevada Plan Overview at 3 and Appendix B; Nev.Rev.Stat. §§ 387.121; 387.1235(Identifying local funds in The Nevada Plan); 373.010 *et seq.* (Local School Support Tax Law); 387.195 (describing local property tax); 387.030 (describing state distributive account). Moreover, school districts generate local revenue beyond the amount allocated to the guaranteed basic support. Nevada Plan Overview at Appendix B. This additional local revenue is considered to be " 'outside' the Nevada Plan formula." Nevada Plan Overview at 3. When these local revenues exceed or fall short of estimates, state aid does not decrease or increase. *Id.* Because the state guarantees only a minimum amount of per pupil spending, not a maximum, and because school districts may generate funds in addition to those provided by the state, it is not necessarily true that an amount withdrawn from a school district's account in order to pay a judgment will be replaced with state money.

Defendants make much of the fact that the State of Nevada limits school districts' ability to raise local revenue. The local funds "inside" the Nevada Plan consist of 25 cents of the 75 cent property tax earmarked for school operations and a 2.25 percent sales tax known as the Local School Support Tax. Nevada Plan Overview at 3 and Appendix B; Nev.Rev.Stat. §§ 387.1235 ("Local funds available for public schools"); § 374.010 *et seq.* ("Local School Support Tax Law"). The local funds "outside" the Nevada Plan include the remaining 50 cents of the 75 cent property tax, a portion of the motor vehicle privilege tax, franchise taxes, interest income, tuition and rent. Nevada Plan Overview at 3.

Defendants correctly point out that these local sources of revenue are predetermined by state law and that "school districts have very little discretion in tax revenues." Nevada Plan Overview at 6. That the State of Nevada controls how local revenue is generated, however, is not relevant for purposes of the first *Mitchell* factor. Defendants cannot demonstrate that the State of Nevada bears a legal obligation to satisfy any adverse judgment against the District. Nor can they demonstrate that any money withdrawn from the District's account to satisfy such a judgment will necessarily be replaced with state funds, as in California.

The second *Mitchell* factor, "whether the entity performs central governmental functions," also distinguishes Nevada from California. *Mitchell*, 861 F.2d at 201. On balance, Nevada does not "treat[ ] public schooling as a state-wide or central governmental function." *Belanger*, 963 F.2d at 253. The State of Nevada created the school system and agreed to provide for its support, Nev. Const. Art. 11, §§ 2 and 6, and the county school districts are "political subdivision[s] . . . whose purpose is to administer the state system of public education." Nev.Rev.Stat. § 386.010. Nonetheless, the legislature has expressly "reaffirm[ed] its intent that public education in the State of Nevada is essentially a matter for local control by local school districts." Nev.Rev.Stat. § 385.005 ("Declaration of legislative intent"). Defendants cannot point to any authority supporting the proposition that Nevada school districts are "treated as state agencies under [Nevada] law" or that "[Nevada] law is well settled that providing public education is a state function." *Compare Belanger*, 963 F.2d at 253 ("[T]hrough the state constitution, statutes, and supreme court decisions, California has made

public schooling a state governmental function."). Rather, local school districts possess "such rights and powers as are necessary to maintain control of education of the children within their respective districts." Nev.Rev.Stat. § 385.005; *see also* Nev.Rev.Stat. § 386.350(defining general powers of board of trustees of school district).

Third, each county school district has "the power to sue and may be sued." Nev.Rev.Stat. § 386.010(3). The third *Mitchell* factor thus weighs slightly against holding that the District is an arm of the state. *Belanger*, 963 F.2d at 254 (holding that third *Mitchell* factor "is entitled to less weight than the first two factors").

Fourth, the District is not required to take property only in the name of the State of Nevada. The board of trustees, which runs the school district and the schools within that district, Nev.Rev.Stat. § 386.350, holds, manages and controls school district property. Nev.Rev.Stat. §§ 393.010; 393.030. The board of trustees has custody of the schoolhouses, and it may insure "the schoolhouses, furniture and school apparatus." Nev.Rev.Stat. § 393.020. Further, the board may sell, rent or lease real property belonging to the school district when it is "necessary or for the best interests of the school district," Nev.Rev.Stat. § 393.220. This factor also distinguishes Nevada from California, where property held in the name of a school district was nonetheless treated as "state property rather than local government property." *Belanger*, 963 F.2d at 254.

Finally, even though the school district itself is not a corporation, each board of trustees is a corporation. Nev.Rev. Stat. § 386.110. Accordingly, this factor weighs against granting the District Eleventh Amendment immunity. Once again, *Belanger* is distinguishable. There, we held that California "school districts have the corporate status of agents of the state for purposes of school administration." *Belanger*, 963 F.2d at 254. As we have discussed in addressing the other four *Mitchell* factors, there is no basis in Nevada law to so conclude here.

In sum, after examining the nature of school districts in Nevada and inquiring into Nevada's treatment of school districts, we conclude that the *Mitchell* factors weigh against a finding that the District is an arm of the state, entitled to Eleventh Amendment immunity. Most importantly, Nevada is not legally required to satisfy any judgment against the District. It is also not true that state funds will necessarily satisfy any such adverse judgment. In addition, the District does not perform a "central governmental function." Instead, Nevada has delegated responsibility for the state system of education to local units. Moreover, the District may sue and be sued and its board of trustees holds its property. Finally, even though the district itself is not a corporation, the board of trustees is. Consequently, the District is more like a local or county agency than like a state agency. *Mt. Healthy*, 429 U.S. at 280-81, 97 S.Ct. 568.

Appendix A

II.

Defendants contend that, even if the District does not enjoy Eleventh Amendment immunity, the individual defendants may not be held liable under either the ADA or the Rehabilitation Act. *See, e.g., Vinson v. Thomas*, 288 F.3d 1145, 1155-56 (9th Cir.2002); *Garcia v. S.U.N.Y. Health Sciences Center*, 280 F.3d 98 (2d Cir.2001), ("[N]either Title II of the ADA nor § 504 of the Rehabilitation Act provides for individual capacity suits against state officials."). We decline to address the issue here, as plaintiffs do not appeal the dismissal of their ADA and Rehabilitation Act claims against the individual defendants. Of course, plaintiffs' § 1983 and state law claims against the individual defendants—in both their official and individual capacities—survive, insofar as they do not "vindicate rights created by Title II of the ADA or section 504 of the Rehabilitation Act." *Vinson*, 288 F.3d at 1156.

III.

Because we reverse the district court's entry of judgments in both cases in favor of defendants, we also reverse the costs awards. *Amarel v. Connell*, 102 F.3d 1494, 1523 (9th Cir. 1997). Even though we do not reverse the district court's dismissal of plaintiffs' ADA and Rehabilitation Act claims against the individual defendants, the district court on remand should await the resolution of plaintiffs' remaining claims before deciding whether an award of costs is appropriate. *Id.*

Appendix A

CONCLUSION

The district court erroneously concluded that the Clark County School District is an arm of the state, entitled to Eleventh Amendment immunity. We therefore reverse the dismissal of plaintiffs' § 1983 and state law claims against all defendants, as well as the dismissal of plaintiffs' ADA and Rehabilitation Act claims against the District. We do not reverse the district court's dismissal of plaintiffs' ADA and Rehabilitation Act claims against the individual defendants. Finally, because we reverse the entry of judgments in favor of defendants in both cases, we also reverse the costs awards.

REVERSED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA DATED OCTOBER 30, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-S-97-1608 RLH (LRL)

DERRICK EASON, a Minor, By his next friend and Parent, SERENA EASON,

Plaintiffs.

vs.

CLARK COUNTY SCHOOL DISTRICT, ROBERT T. HENRY, individually and in his former capacity as Director of Program Development; BEVERLY H. MINNEAR, individually and in her official capacity as Principal of Variety School; MILA KITT, individually and in her official capacity as Teacher at Variety School,

Defendants.

ORDER

(Plaintiff's Motion to Consolidate #48)

This matter came before the Court on Plaintiff's Motion to Consolidate (#48). The Court has considered Plaintiff's Motion (#48), Defendants' Opposition (#53) and Plaintiff's Reply (#5).

Appendix B

BACKGROUND

This case is a suit for damages arising out of alleged practices of excessive corporal punishment and abuse[1] inflicted upon Plaintiff while he attended Variety School ("Variety"). The Plaintiff, Derrick Eason, is an eight year old boy who has been diagnosed with autism, cognitive impairment, and attention deficient hyperactivity disorder. Eason is a qualified individual with a disability within the meaning of all applicable statutes including Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794, and the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12131.

DISCUSSION

Plaintiff argues that his case should be consolidated with the case of *Witte v. Clark County School Dist., et al.*, Case No. CV-S-98-0368 RLH (LRL). Plaintiff contends that Fed. R. Civ. P. 42(a) allows for consolidation when the actions involve a "common question of law or fact" and that these two cases contain such commonality. Defendants claim that the risk of confusion and prejudice resulting from consolidation outweighs any benefit obtained therefrom.

---

1. Eason claims that a few of these practices included: a) having noxious tasting solutions applied to his mouth and lips; b) having vinegar placed in his food; c) being subject to a "take down", which apparently is akin to some form of a wrestling move in which Eason was placed on his stomach and hād his arms and legs forcibly crossed behind him; and d) running on a treadmill with sand weights attached to his ankles for long durations of time.

Appendix B

I. Consolidation Standard

Fed. R. Civ. P. 42(a) allows the court to order consolidation of cases when the actions involve a "common question of law or fact". The rule states: "When actions involving a common question of law or fact are pending before the court, it . . . may order all the actions consolidated. . . ." The court should weigh the saving of time and effort of consolidation versus any inconvenience, delay, or expense consolidation would cause. *Southwest Marine, Inc. v. Triple A Mach. Shop, Inc.*, 720 F.Supp. 805 (D.C. Cal. 1989); *Arnold v. Eastern Air Lines, Inc.*, 681 F.2d 186, 193 (4th Cir. 1982). Where, however, delay or undue prejudice would result from consolidation, separate actions should be maintained. *Henderson v. National R.R. Passenger Corp.*, 118 F.R.D. 440, 441 (N.D. Ill. 1987). The Court believes the delay and prejudice that would result from consolidation favors maintaining separate actions.

II. Maintaining Separate Actions

Plaintiff contends that the two actions should be consolidated because: 1) both plaintiffs allege the use of corporal punishment and other forms of punishment; 2) both situations occurred while plaintiffs attended Variety; and 3) both cases are brought against the Clark County School District ("CCSD"), Robert T. Henry ("Henry") and Beverly Minnear ("Minnear").

Appendix B

A. Corporal Punishment

Although both plaintiffs allege the same general factual allegations, they have based them on different acts of misconduct. In the instant case, Eason has alleged the following misconduct against the Variety staff: 1) being "taken down"; 2) being sprayed in the face with cold water; 3) being forced to wear ankle weights and remain on a treadmill for long durations of time; 4) having degrading and humiliating remarks yelled and screamed at him; 5) having noxious tasting solutions applied to his mouth and lips; 6) having vinegar placed in his food; 7) being denied food for the entire school day; and 8) having a surgical-type mask placed over his face.

Although both plaintiffs share five of the above types of instances of conduct[2], *Witte* alleges at least six additional acts of conduct that Eason has not alleged (forced to eat vomit, choked by school personnel, forced to write sentences over and over again, physical abuse in January 1998, forced to stand in the corner, and threatened by Variety staff). Considering the different actions, it is apparent that the two cases rely on different sets of facts, not a common one.

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2. Being "taken down", being forced to wear ankle weights and remain on treadmill for long durations of time, being sprayed in the face with cold water, having degrading and humiliating remarks yelled and screamed at them, and being denied food for the entire school day.

Appendix B

B. Both Plaintiffs Attending Variety

Plaintiff argues that he and Witte both attended Variety at the same time. It is true that both plaintiffs were at Variety during the 1995-1996 and 1996-1997 school years. Eason contends that the misconduct occurred during these years, but Witte alleges the abuse occurred during the 1995-1998 school years. Witte began attending Variety in November 1995 and Eason left Variety in September 1997. As such, there was less than two years during which both plaintiffs attended Variety as the same time. If consolidation were to occur, it may cause undue prejudice to CCSD because the alleged misconduct occurred for an additional year to Witte but after Eason left.

C. Common Defendants

Eason notes that both plaintiffs have sued CCSD, Henry and Minnear. By doing so, Eason argues that proof of liability as to each of these defendants will be practically identical. Eason's argument must be rejected. Even though the plaintiffs have sued three common defendants, the differing factual allegations would lead to different potential witnesses in the two cases. For example, both plaintiffs did not have the same teacher. This would mean that both plaintiffs would have to interview and prepare for two sets of differing witnesses. Furthermore, the plaintiffs did not have the same teacher's aide, obviating the need for different witnesses. These differences do not tend to show commonality of the same issue.

Appendix B

In sum, Plaintiff's Motion (#48) must be denied because the cases do not involve a common question of fact. Additionally, the delay and prejudice that would result from consolidation cannot be overcome. The factual allegations of misconduct in both cases differ substantially, the time frame within which plaintiffs attended Variety is different and the defendants in each case differ.

CONCLUSION

Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that Plaintiff's Motion to Consolidate (#48) is DENIED.

Dated October 30, 2000.

s/ Roger L. Hunt
ROGER L. HUNT
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA DATED OCTOBER 27, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-S-98-0368 RLH (LRL)

SHAWN WITTE, a minor, by his next friend and parent, TERESA WITTE,

Plaintiffs.

vs.

CLARK COUNTY SCHOOL DISTRICT, ROBERT T. HENRY, individually and in his former capacity as Director of Program Development; BEVERLY H. MINNEAR, individually and in her capacity as Principal of Variety School; WOODARD MACKE, individually and in his official capacity as Teacher at Variety School,

Defendants.

ORDER

(Defendant's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(c) (#39))

This matter came before the Court on Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(c) (#39). The Court has considered Defendants' Motion (#39), Plaintiff's Opposition (#43), Defendants' Reply (#44) and Defendants' Supplement (#51).

Appendix C

BACKGROUND

This case is a suit for damages arising out of alleged practices of excessive corporal punishment and abuse[1] inflicted upon Plaintiff while he attended Variety School ("Variety"). The Plaintiff, Shawn Witte, is a 10 year old boy who has been diagnosed with Tourette Syndrome, asthma, attention deficient hyperactivity disorder and emotional problems. Witte is a qualified individual with a disability within the meaning of all applicable statutes including Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794, and the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12131.

Witte has brought the following causes of action: violation of Nevada Revised Statute ("NRS") 392.465, Section 504, the ADA, 42 U.S.C. § 1983 as to substantive due process and equal protection, and assault and battery. Defendants respond by claiming that pursuant to the doctrine of sovereign immunity, they are immune from suit in federal court on all of Witte's causes of action.

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1. Witte claims that a few of these practices included: a) being forced to eat oatmeal, which Defendants were aware he was allergic to, mixed with his own vomit; b) choke marks inflicted by Mike Nelson in an attempt to make Witte run faster; c) being subject to a "take down", which apparently is akin to some form of a wrestling move in which Witte was placed on his stomach and had his arms and legs forcibly crossed behind him; and d) running on a treadmill with sand weights attached to his ankles in an effort to tire him so he would not leave his seat.

Appendix C

DISCUSSION

Defendants argue in their Motion (#39) that Witte's complaint should be dismissed based upon lack of subject matter jurisdiction, because they are entitled to sovereign immunity under the Eleventh Amendment. At the outset, the Court takes notice that both parties have analyzed the issue under the multi-factored balancing test established in *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 201 (9th Cir. 1988). *Mitchell* held that the following factors should be utilized in determining sovereign immunity: The factors to be examined are: 1) whether a money judgement would be satisfied out of state funds, 2) whether the entity performs central governmental functions, 3) whether the entity may sue or be sued, 4) whether the entity has the power to take property in its own name or only the name of the state, and 5) the corporate status of the entity. "The most 'crucial question . . . is whether the named defendant has such independent status that a judgement against the defendant would not impact the state treasury.' " *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982) (quoting *Ronwin v. Shapiro*, 657 F.2d 1071, 1073 (9th Cir. 1981)). In *Belanger v. Madera Unified School Dist.*, 963 F.2d 248 (9th Cir. 1992), the court followed the *Jackson* analysis and determined that the first *Mitchell* factor was predominant in its analysis. However, this Court is convinced that the *Mitchell* factors are helpful but not controlling in the determination of this case.

In *Mitchell*, the court examined the California state universities and college systems. Here, the Nevada school districts are set up differently than those found in California.

Appendix C

California sets a revenue limit for each school district based on average attendance, subtracts property tax revenues from that limit, and allocates the balance to the school district from the state school fund. *Belanger* 963 F.2d at 252. In Nevada, the legislature has vested each school district with "such reasonable and necessary power . . . to promote the welfare of school children" NRS § 486.350. Also, the legislature has stated its intent that "public education in the State of Nevada is essentially a matter of local control by the local school districts." NRS § 385.005(1).

As the Honorable Chief Judge Howard D. McKibben has pointed out, Nevada public schools are treated as state agencies under Nevada law. *See* Order (#14) dated October 4, 2000, attached to Defendants' Supplement (#51) as Exhibit A. The Nevada Constitution requires the state legislature to provide a uniform system of common schools, and to provide for their support and maintenance. Nev. Const. Art. XI, §§ 2, 6. Therefore, the factors applied in *Mitchell* concerning the California state universities and colleges are not controlling in assessing the Clark County School District in this case.

Additionally, both parties have cited to *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), and framed the issue as whether Plaintiff can bring action against the Defendants. However, the Court believes that the controlling issue is whether the Plaintiff has the right to bring action against the Defendants in federal court. Hence, before the *Kimel* "congruence and proportionality" test can be applied to this case, it must be determined if the Court has pertinent jurisdiction over the Defendants in federal court.

Appendix C

I. Sovereign Immunity

Both parties appear to use the terms "sovereign immunity" and "Eleventh Amendment immunity" interchangeable throughout their arguments. Even so, the Court believes it is necessary to distinguish between common law sovereign immunity and constitutional sovereign immunity provided by the Eleventh Amendment. Common law sovereign immunity has been a long recognized legal principle that dates back to the feudal system. *Nevada v. Hall*, 440 U.S. 410, 414 (1979). It has evolved to become a doctrine wherein a State has immunity from being sued in its own courts, but the State can choose to waive the immunity by consent. *Id.*

The doctrine of constitutional sovereign immunity derives from the Eleventh Amendment. Specifically, the Eleventh Amendment states "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Under the Eleventh Amendment, a state is immune from suit under state or federal law by private parties in federal court absent a valid abrogation of that immunity or an express waiver by the state. *College Savs. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999). However, a state can allow suits against it or its instrumentalities in its own courts without consenting to suit in federal court. Id. at 676. Thus, a federal court should not infer that a state has consented to suit in federal court merely because it has waived its common law sovereign immunity in its own courts. *See* Wright, A. Miller, & E. Cooper, 13 Federal Practice and Procedure

§ 3524, p. 171 (1982); *Florida Dep't of Health & Rehabilitation Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981).

In the case at bar, it is apparent that the Defendants are immune from suit in federal court in accordance with constitutional sovereign immunity under the Eleventh Amendment. In order for a State to face suit in federal court, it must waive its constitutional sovereign immunity "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *College Savs. Bank* 527 U.S. at 678 (1999). Here, the Defendants have not waived their constitutional sovereign immunity. Although the Defendants have clearly stated under NRS 386.010(3) that they have the right to sue or be sued, this only waives their common law sovereign immunity to be sued in Nevada courts. Even though the school district has waived its common law sovereign immunity, it does not necessarily follow that the school district can be sued for money damages just because it can be sued in its own name. *Belanger* 963 F.2d at 254.

Because Defendants have waived their common law sovereign immunity under NRS 386.010(3), this cannot be held as a waiver of the Defendants constitutional sovereign immunity under the Eleventh Amendment. Based upon this analysis, the Court has no jurisdiction over the Defendants.

Appendix C

CONCLUSION

Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that Defendants Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(c) (#39) is GRANTED.

Dated October 27, 2000.

s/ Roger L. Hunt
ROGER L. HUNT
United States District Judge

No. 02-890

Supreme Court, U.S.
FILED
JAN 13 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

CLARK COUNTY SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

DERRICK EASON, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should overrule longstanding precedent holding political subdivisions of the state are not entitled to Eleventh Amendment immunity when their legal liability does not run against the state and does not legally or practically obligate the state treasury.

PARTIES TO THE PROCEEDINGS

Petitioners are the Clark County School District, a political subdivision of the State of Nevada, Robert T. Henry, Beverly J. Minnear, Woodard Macke and Mila Kitt in their official and individual capacities.

Respondents are Derrick Eason, a minor, by his next friend and parent Serena Eason, and Shawn Witte, a minor, by his next friend and parent Teresa Witte who filed the underlying civil actions in this matter.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully request this Court deny the petition for a writ of certiorari seeking review of the judgments of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-17a, is reported at 303 F.3d 1137. The ruling of the district court, Pet. App. 24a-30a, is unreported.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on September 11, 2002. No request for a rehearing was filed. The petition for a writ of certiorari was filed on December 10, 2002. This Court's jurisdiction has been invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the

United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

STATEMENT OF THE CASE

This action arises as a result of repeated physical, psychological and verbal abuse inflicted upon two students with disabilities at Variety School, a public school which provides education to only students with disabilities within the Clark County School District. Respondents are two young students with severe disabilities, Derrick Eason and Shawn Witte (Respondents Eason and Witte), who fell victim to repeated brutal practices at the hands of their teachers and other Clark County School District personnel including the "take down" where the students were pinned to the ground with their arms and legs forcibly crossed behind their backs while a teacher applied pressure to their buttocks or spines; being sprayed in the face with cold water; being forced to run or walk on the treadmill with weights tied to their ankles; having a teacher scream degrading comments at them; having vinegar put in their food; and being force fed food mixed with their own vomit.

Petitioners are the Clark County School District, a political subdivision of the State of Nevada, and four of its employees, Robert T. Henry, Beverly J. Minnear, Woodard Macke and Mila Kitt, named in both their individual and official capacities (Petitioner CCSD). Respondents Eason and Witte filed suit alleging causes of action based on 42 U.S.C. § 1983 for violations of their constitutional rights to substantive due process and equal protection; § 504 of the Rehabilitation Act of 1973, *as amended*, 29 U.S.C. § 794;

Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.*; and various state tort laws. Federal jurisdiction is based on 28 U.S.C. §§ 1331 and 1343, 42 U.S.C. § 12188(a)(1) and 28 U.S.C. § 1367.

The United States District Court for the District of Nevada, on a motion to dismiss for failure to state a claim, dismissed the action in its entirety after deeming Petitioner CCSD a state agency without any discussion of the facts or Nevada state law necessary for determining whether Petitioner CCSD is an arm of the state. Relying on *Belanger v. Board of Trustees of Madera Unified School District*, 963 F.2d 248, 254 (9th Cir. 1992), *cert. denied*, 507 U.S. 919 (1993) the district court concluded Petitioner CCSD enjoyed Eleventh Amendment immunity because it is a school district. The district court reasoned that because Petitioner CCSD has the right to sue or be sued under Nev. Rev. Stat. § 386.010(3) (2001), Petitioner CCSD has waived only its common law sovereign immunity to be sued in Nevada courts thereby concluding "[i]t does not necessarily follow that the school district can be sued for monetary damages just because it can be sued in its own name." Pet. App. 29a. The district court ignored this Court's holding in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) that school districts are ordinarily not immune from suit, as well as the Ninth Circuit test for determining whether an entity is an arm of the state in contrast to a political subdivision, as articulated in *Belanger* itself.

Relying on *Mt. Healthy*, the Ninth Circuit reversed the district court's dismissal of Respondents Eason and Witte's § 1983 action. The Ninth Circuit found Petitioner CCSD, a political subdivision of the State of Nevada, "more like a local or county agency than like a state

agency." Pet. App. 15a. Furthermore, the Ninth Circuit reviewed and applied all the factors articulated in *Mitchell v. Los Angeles Community College District*, 861 F.2d 198, 201 (9th Cir. 1988), *cert. denied*, 490 U.S. 1081 (1989) consistent with this Court's prior holdings in determining Petitioner CCSD is not an arm of the state. Pet. App. 9a-15a.

Of significance, the Ninth Circuit found the first *Mitchell* factor, whether a money judgment will be satisfied out of state funds, "the most important consideration determining whether an entity is an arm of the state." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). The Ninth Circuit also referred to *Regents of the University of California v. Doe*, 519 U.S. 425, 431 (1997), which focused on the potential legal liability of the state to satisfy a judgment when determining whether an entity is an arm of the state despite the legal obligation of another entity to indemnify the state. Pet. App. 9a. In determining whether a money judgment would be satisfied out of state funds, the Ninth Circuit looked not only for Petitioner CCSD to demonstrate the State of Nevada bore a legal obligation to satisfy any adverse judgment against Petitioner CCSD, but also looked at Petitioner CCSD's failure to demonstrate that any money withdrawn from its account to satisfy such a judgment would necessarily be replaced with state funds. Pet. App. 13a. Therefore, the Ninth Circuit considered whether the state would be legally liable to satisfy a judgment as well as practically liable to satisfy a judgment. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984).

The Ninth Circuit decision finding Petitioner CCSD more like a county than an arm of the state and, among all other factors outlined in *Mitchell*, the state is not legally or

practically liable to satisfy a money judgment against Petitioner CCSD, is consistent with this Court's prior holdings, the holdings of other courts of appeals and also with other Ninth Circuit decisions. As such, there is no basis for this Court to grant Petitioner CCSD's petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION

1. Certiorari is not warranted as there is no important issue of federal law and no conflict among the circuits as to whether local governmental agencies, including school districts, are protected by the Eleventh Amendment.

Longstanding and unbroken precedent of this Court has established that political subdivisions of the state (counties, municipal corporations and entities such as school districts that resemble counties and municipal corporations) are not entitled to Eleventh Amendment immunity. *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890); *Moor v. County of Alameda*, 411 U.S. 693, 717-21 (1973); *Mt. Healthy*, 429 U.S. at 280; *Pennhurst*, 465 U.S. at 123 n.34; *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 369 (2001) ("the Eleventh Amendment does not extend its immunity to units of local governments"). Arms of the state (state entities that are so much a part of the state that they are entitled to the sovereignty of the state itself) are immune. Indeed, this Court in *Luning* specifically held Nevada counties and municipal or governmental corporations are not entitled to Eleventh Amendment immunity. *Luning*, 133 U.S. at 531.

This long and unbroken line of cases, which dates back over 110 years, establishes that the Eleventh Amendment only immunizes state governments, not local entities. *Luning*, 133 U.S. at 530 ("The constitution of the state of Nevada explicitly provides for the liability of counties in suit."); *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979) ("consistently [this Court has] refused to construe the [Eleventh] Amendment to afford protection to political subdivisions . . . even though such entities exercise a 'slice of state power'"); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 35 (1994) ("Political subdivisions exist solely at the whim and behest of their State, yet cities and counties do not enjoy Eleventh Amendment immunity.").

Although the determination of whether an entity is an arm of the state is a question of federal law, courts carefully scrutinize the state's statutes and case law creating that entity. *Doe*, 519 U.S. at 430 n.5. The test for determining whether an entity is an arm of the state is fact specific requiring courts to look at the "nature of the entity created by state law." *Mt. Healthy*, 429 U.S. at 280.

In *Mt. Healthy*, in holding local Ohio school districts are not entitled to Eleventh Amendment immunity, this Court examined the characterization of the school district under state law; guidance and control received by the State Board of Education; the amount of funding received by the State; and the school districts' ability to issue bonds and levy taxes within certain restrictions of state law. *Id.* This Court found no immunity, because in Ohio, local school districts are defined as political subdivisions in state law, have extensive powers to bond and levy taxes, and are one of many local school boards. Thus, even though the state gave a significant amount of money to the

school district and exercised guidance over the districts, this Court found that it was not entitled to assert Eleventh Amendment immunity as it was more like a county or city than an arm of the state. *Id.*

Consistent with the Ohio school districts examined in *Mt. Healthy*, most school districts in the country are created by their state with state control and funding. Yet, "it is crystal clear that [counties, municipalities and school districts] are not entitled to immunity from suit in federal court" after *Mt. Healthy. Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 661 (3rd Cir. 1989). Using the *Mt. Healthy* analysis, the courts of appeals have consistently found that most all school districts in the country are not entitled to Eleventh Amendment immunity. *See, e.g.*, *Cuesta v. Sch. Bd. of Miami-Dade County*, 285 F.3d 962, 966 (11th Cir. 2002) (Florida); *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219 (4th Cir. 2001) (North Carolina); *Duke v. Grady Mun. Sch.*, 127 F.3d 972 (10th Cir. 1997) (New Mexico); *Ambus v. Granite Bd. of Educ.*, 995 F.2d 992 (10th Cir. 1993) (Utah); *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1509-11 (11th Cir. 1990) (Alabama); *Lester H. v. Gilhool*, 916 F.2d 865, 870-71 (3d Cir. 1990) (Pennsylvania); *Rosa R. v. Connelly*, 889 F.2d 435, 437-38 (2d Cir. 1989) (Connecticut); *Lopez v. Houston Indep. Sch. Dist.*, 817 F.2d 351, 353 (5th Cir. 1987) (Texas) (*citing Kingsville Indep. Sch. Dist. v. Cooper*, 611 F.2d 1109, 1112 (5th Cir. 1980)), *overruled on another ground by Walton v. Alexandar*, 44 F.3d 1297 (5th Cir. 1995); *Fay v. S. Colonie Cent. Sch. Dist.*, 802 F.2d 21, 27 (2d Cir. 1986) (New York); *Minton v. St. Bernard Sch. Bd.*, 803 F.2d 129, 131-32 (5th Cir. 1986) (Louisiana); *Gary A. v. New Trier High Sch. Dist. No. 203*, 796 F.2d 940, 945 (7th Cir. 1986) (Illinois); *Stoddard v. Sch. Dist.*

No. 1, Lincoln County, 590 F.2d 829 (10th Cir. 1979) (Wyoming); *Unified Sch. Dist. No. 480 v. Epperson*, 583 F.2d 1118, 1121-23 (10th Cir. 1978) (Kansas); *Adams v. Rankin County Bd. of Educ.*, 524 F.2d 928, 929 (5th Cir. 1975) (Mississippi). *But see Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248 (9th Cir. 1992) (California); *De Levay v. Richmond County Sch. Bd.*, 284 F.2d 340 (4th Cir. 1960) (Virginia).

The Ninth Circuit consistently applied this Court's *Mt. Healthy* decision in *Mitchell* to find Petitioner CCSD was not an arm of the state entitled to Eleventh Amendment immunity. Specifically, under *Mitchell*, in determining whether an entity is an arm of the state for purposes of Eleventh Amendment immunity, the following factors are reviewed: 1) whether a money judgment would be satisfied out of state funds; 2) whether the entity performs central governmental functions; 3) whether the entity may sue or be sued; 4) whether the entity has the power to take property in its own name or only the name of the state; and 5) the corporate status of the entity. *Mitchell*, 861 F.2d at 201. These factors are consistent with this Court's prior holdings in determining whether an entity is an arm of the state and does not present an important issue of federal law.

Petitioner CCSD contends that each circuit applies different tests in determining whether an entity is an arm of the state. In fact, the tests are so similar there is no significant difference among them. Furthermore, in this case, any difference is immaterial because Petitioner CCSD is a political subdivision of the state under any of the circuit tests, not an arm of the state.

Petitioner CCSD states "the Fourth and Fifth Circuits consider important whether the entity performs traditionally state or local functions" and the Third Circuit has expressly rejected this factor. This is inaccurate. The Third Circuit has emphasized that whether the entity performs traditionally state or local functions is encompassed within the articulated factor "the status of the agency under state law" consistent with *Mt. Healthy* and other circuits. *Carter v. City of Philadelphia*, 181 F.3d 339, 347 n.21 (3d Cir. 1999). *See also*, *Mitchell*, 861 F.2d at 201 (second factor: whether the entity performs central governmental functions).

Petitioner CCSD contends only the Fourth and Seventh Circuits "look at whether the scope of the entity's authority is statewide or only regional." However, as stated in *Kashani v. Purdue University*, 813 F.2d 843, 847-48 (7th Cir. 1987), this Court in *Mt. Healthy* looked at whether the entity in question was formed with independent powers from the state as well as whether it served the state as a whole or only a region. *See Mt. Healthy*, 429 U.S. at 280 ("Petitioner is but one of many local school boards within the State of Ohio."). *See also, Mitchell*, 861 F.2d at 201 (second factor: whether the entity performs central governmental functions).

Petitioner CCSD asserts only the First and Eighth Circuits look at whether the entity's "property is subject to taxation by the State" instead of whether the entity can "hold property in its own name." This is misleading. For example, in *Wojcik v. Massachusetts State Lottery Commission*, 300 F.3d 92, 100 (1st Cir. 2002), the First Circuit analyzed if the entity has "the power to lease real property in its own name" in determining whether the property is subject to taxation by the state, consistent with *Mt.*

Healthy. *See also, Mitchell*, 861 F.2d at 201 (fourth factor: whether the entity has the power to take property in its own name or only the name of the state).

Petitioner CCSD contends only the Second and Seventh Circuits "expressly name how the governing entities are appointed" and by whom they are appointed as a factor. This is not true. Every circuit reviews how the governing entity is appointed when reviewing the degree of state versus local control granted to the entity. A review of whether local board members are elected by voters in the precinct they represent is encompassed within this review consistent with *Mt. Healthy*. *Ambus v. Granite*, 995 F.2d 992, 996 (10th Cir. 1993). *See also*, *Mitchell*, 861 F.2d at 201 (second factor: whether the entity performs central governmental functions).

Petitioner CCSD states the "Third, Fifth, Seventh and Eleventh Circuits expressly include the source of the entity's funding as a factor under the arm of the state doctrine." Actually, all circuits have noted this as "considerable importance" in determining if the state will be liable for a money judgment relying on *Doe*. *See also*, *Mitchell*, 861 F.2d at 201 (first factor: whether a money judgment would be satisfied out of state funds).

The articulation of various factors by various courts of appeals are varying ways of phrasing the same requirements outlined by this Court in order to determine the nature of the entity created by state law. The differences in phrasing are not a basis for concluding there is a circuit split or that this Court has failed to provide the circuits with guidance on the issue. All circuits apply a variety of factors, all of which are consistent with *Mt. Healthy* in determining whether an entity is an arm of the state.

Petitioner CCSD also claims the Ninth Circuit decision creates an intracircuit split, citing *Belanger*. In *Belanger*, the Ninth Circuit analyzed the local California school districts to determine if they were entitled to immunity. The *Belanger* court reviewed the *Mitchell* factors and distinguished the local California school districts from the school districts presented in *Mt. Healthy*. The court found persuasive that in California, the state has uniquely assumed responsibility for and control over school funding. As a result, the court found local California school districts are agents of the state itself. In California:

> The state sets a revenue limit for each school district based on average attendance, subtracts property tax revenues from that limit, and allocates the balance to the school district from the state school fund. In short, the state determines the amount of money that school districts may spend per pupil and then provides the necessary state funds.

Belanger, 963 F.2d at 252.

By virtue of this revenue limit system, state and local revenue is commingled in a single fund under state control, and local tax revenue lost to a judgment must be supplanted by the interchangeable state funds already in the district budget. Thus, as the Ninth Circuit states, in California, any use of commingled funds is a use of state funds.

The Ninth Circuit, however, is careful to point out that "[i]n the critical area of school funding . . . California has selected a different path from that of most states." *Id.* at 254. This illustrates how, in the application of consistent factors, results will vary depending on how the entity

is created by state law. This does not illustrate that there is disarray among circuits or within the Ninth Circuit. Since Ninth Circuit precedents are consistent with *Mt. Healthy*, there is no reason to review what the Ninth Circuit has done here.

As outlined by the Ninth Circuit, given the vast similarities between Petitioner CCSD and the local Ohio school districts examined in *Mt. Healthy*, a finding that Petitioner CCSD is more like a local or county agency than like a state agency does not present an important issue of federal law or conflict with any of this Court's prior decisions. Such a finding is thoroughly consistent with this Court's prior holdings finding local governmental agencies are not entitled to Eleventh Amendment immunity. Therefore, this Court should deny Petitioner CCSD's petition for a writ of certiorari.

2. Certiorari is not warranted as the Ninth Circuit, consistent with this Court's precedents and other circuits, correctly found Petitioner CCSD is a political subdivision of the state rather than an arm of the state.

The Ninth Circuit correctly applied this Court's precedents in finding Petitioner CCSD is a political subdivision of the State of Nevada rather than an arm of the State of Nevada. The Ninth Circuit did so by applying the *Mitchell* factors which are consistent with decisions of this Court. The tests used by all other circuits, which are also consistent with decisions of this Court, would also lead to the same result. In making its ruling; the Ninth Circuit considered the following:

First, the Ninth Circuit looked at whether a money judgment would be satisfied out of state funds. Pet. App. 9a-13a. "The question whether a money judgment against a State instrumentality or official would be enforceable against the state is of considerable importance to any evaluation of the relationship between the State and the entity or individual being sued." *Doe*, 519 U.S. at 430. In *Hess*, this Court focused on whether "legally and practically" the state is obligated to bear and pay the resulting indebtedness of the entity in question in determining whether Eleventh Amendment immunity is implicated. *Hess*, 513 U.S. at 36. Subsequently, in *Doe*, this Court focused on the "entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance" without indicating whether an entity is entitled to Eleventh Amendment immunity if the practical effect of the judgment is to obligate the state to pay. *Doe*, 519 U.S. at 431.

The Ninth Circuit found there is no statutory provision requiring the State of Nevada to satisfy its school districts' debts. Pet. App. 10a. As in *Mt. Healthy*, and consistent with most all other school districts around the country, Nevada local school districts receive state funding. However, as the Ninth Circuit found, local funds lost to satisfy a money judgment will not be replaced with state funds. Pet. App. 11a.

Nevada's educational funding scheme, known as the Nevada Plan, has a "basic support or guarantee" consisting of state funds to guarantee that each school district has that minimum amount to be spent per pupil. *Id.* The amount of money each school district receives from the state varies. However, each school district is obligated to

earmark certain locally generated revenue to the minimum budget. This locally generated revenue is subtracted from the state guaranteed basic support and the difference (if there is any) is provided by the state. Pet. App. 11a-12a.

In Nevada, school districts may generate local revenue beyond the amount allocated to the guaranteed basic support. Pet. App. 12a. This additional local revenue is considered "outside" the Nevada Plan formula. When these local revenues exceed or fall short of estimates, the amount of money the school district receives from the state does not decrease or increase. As stated by the Ninth Circuit:

> Because the state guarantees only a minimum amount of per pupil spending, not a maximum, and because school districts may generate funds in addition to those provided by the state, an amount withdrawn from a school district's account in order to satisfy a money judgment will not be replaced with state money.

Pet. App. 12a.

The Ninth Circuit found Petitioner CCSD could not demonstrate the State of Nevada bore a legal obligation to satisfy any adverse judgment against it. Pet. App. 13a. The Ninth Circuit found Petitioner CCSD could not demonstrate that any money withdrawn from its account to satisfy a judgment would be replaced with state funds. *Id.* Furthermore, the Ninth Circuit determined that given the independent governing and taxing authority of Petitioner CCSD and the legal non-liability of the state, Petitioner CCSD "as a practical matter" is liable for the judgment. The Ninth Circuit added that there was no showing on the record that the state, "as a practical

matter," would be liable for the judgment. *See Pennhurst*, 465 U.S. at 123 n.34 (finding practical liability if the suit seeks relief that would run against the state if the state could be sued; in the absence of legal liability or direct state control, state funding contributions do not make political subdivisions of the state part of the state itself); *Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459 (1945) (suit against state treasurer in official capacity for tax "refund" is, in effect, suit against the state). Thus, when the Ninth Circuit analyzed the first factor of the *Mitchell* test, it included an analysis of whether the state would be legally and practically liable for a money judgment consistent with this Court's prior holdings.

Next, the Ninth Circuit found "[o]n balance, Nevada does not 'treat[ ] public schooling as a state-wide or central governmental function.'" Pet. App. 13a. The State of Nevada created the school system and agreed to provide for its support, Nev. Const. art. 11, §§ 2 and 6 (2001), and the county school districts are "political subdivisions . . . whose purpose is to administer the state system of public education." *Id.*; Nev. Rev. Stat. § 386.010 (2001). Nonetheless, the legislature has expressly "reaffirm[ed] its intent that public education in the State of Nevada is essentially a matter for local control by local school districts." Pet. App. 13a; Nev. Rev. Stat. § 385.005 (2001) ("Declaration of legislative intent"). Moreover, the Ninth Circuit specifically found that Petitioner CCSD "cannot point to any authority supporting the proposition that Nevada school districts are 'treated as state agencies under [Nevada] law' or that '[Nevada] law is well settled that providing public education is a state function.'" Pet. App. 13a. Rather, local school districts possess "such rights and powers as are necessary to maintain control of education of the children

within their respective districts." Pet. App. 14a; Nev. Rev. Stat. § 385.005 (2001). *See also*, Nev. Rev. Stat. § 386.350 (2001) (defining general powers of board of trustees of school district).

In reviewing the remaining *Mitchell* factors, Pet. App. 14a-15a, the Ninth Circuit found each county school district in Nevada has the power to sue and be sued under Nev. Rev. Stat. § 386.010(3) (2001) and the school districts are not required to take property only in the name of the State of Nevada. The board of trustees, which runs the school district and the schools within that district, Nev. Rev. Stat. § 386.350 (2001), holds, manages and controls school district property. Nev. Rev. Stat. §§ 393.010, .030 (2001). The board of trustees has custody of the schoolhouses, and it may insure "the schoolhouses, furniture and school apparatus." Nev. Rev. Stat. § 393.020 (2001). Further, the board may sell, rent or lease real property belonging to the school district when it is "necessary or for the best interests of the school district." Nev. Rev. Stat. § 393.220 (2001). Finally, even though the school district itself is not a corporation, each board of trustees is a corporation. Nev. Rev. Stat. § 386.110 (2001).

The analysis of the other *Mitchell* factors is consistent with *Mt. Healthy* and *Luning*. The Ninth Circuit did determine the legal and practical effect a money judgment against Petitioner CCSD would have, or in this case not have, on the State of Nevada and properly analyzed the remaining factors of *Mitchell* in determining Petitioner CCSD is a political subdivision of the state and not an arm of the state entitled to Eleventh Amendment immunity.

Given the consistency between the circuits in applying the factors, there is not one circuit that would have found

Petitioner CCSD entitled to Eleventh Amendment immunity. In developing the factors the circuits have necessarily focused on the facts of the cases presented to them. This has resulted in variations in the articulation of the factors but all of the factors set out rules and provide for consistent results which are faithful to the principles outlined in *Mt. Healthy*. No circuit rules out consideration of any factors articulated by other circuits.

For example, the specific factors identified by the Fourth and Fifth Circuits in reviewing whether an entity performs traditionally state or local functions was applied by the Ninth Circuit which found Petitioner CCSD is financed in a manner to ensure local control and local administration with significant autonomy vested in the local school boards. Nev. Rev. Stat. §§ 386.350, 354.474 (2001). The Fourth and Seventh Circuits' review of whether the scope of the entity's authority is statewide or only regional was also analyzed by the Ninth Circuit in finding Petitioner CCSD is one of many local school districts within the State of Nevada which maintains "such rights and powers as are necessary to maintain control of education of the children within their respective districts." Nev. Rev. Stat. § 385.005 (2001). The First and Eighth Circuits identification of whether the entity's property is subject to taxation by the State is also consistent with the Ninth Circuit's finding that the board of trustees run the school district and the schools within that district, Nev. Rev. Stat. § 386.350 (2001), and holds, manages and controls school district property. Nev. Rev. Stat. §§ 393.010, .030 (2001). Furthermore, the board of trustees may sell, rent or lease real property belonging to the school district. Nev. Rev. Stat. § 393.220 (2001).

Factors articulated by the Ninth Circuit, as well as all other circuits, in determining whether an entity is an arm of the state, all provide for a consistent determination in accordance with *Mt. Healthy* standards even though the tests are worded slightly different. As discussed above, all the circuits would have determined Petitioner CCSD to be a political subdivision of the state. None of the circuits would have determined Petitioner CCSD to be an arm of the state. This case does not involve a close question as to whether Petitioner CCSD is an arm of the state. *See, e.g., Ford Motor Co.*, 323 U.S. at 464 (conduct of state officer considered conduct of state itself); *Pennhurst*, 465 U.S. at 123 n.34 (conduct of state department and state institution considered conduct of state itself); *Edelman*, 415 U.S. at 668-69 (conduct of county employee considered conduct of state itself when identical to state conduct resulting in liability).

Finally, Petitioner CCSD cites *Duke v. Grady Municipal Schools*, 127 F.3d 972 (10th Cir. 1997) for the proposition that the Ninth Circuit, like *Duke*, rejected consideration of the practical effect a money judgment would have on the state in determining whether a governmental entity's money judgment sought is to be satisfied out of the state treasury. To argue the Ninth Circuit rejected the inquiry as to whether the state is "practically" obligated to pay a money judgment ignores the Ninth Circuit holding. The Ninth Circuit thoroughly recognized and reviewed Nevada's educational funding scheme and contrasted it with that found in California. Pet. App. 10a-13a. The Ninth Circuit held the State of Nevada is not legally required to satisfy any judgment against Petitioner CCSD and also that state funds would not be obligated to satisfy any such adverse judgment. Pet. App. 15a.

In contrast, while interpreting *Doe* to require it to focus on legal liability for a judgment, rather than practical or indirect impact a judgment would have on a state's treasury, the *Duke* court concluded that since the State of New Mexico is not legally liable for a judgment against a local school district that such are not entitled to Eleventh Amendment immunity. *Duke* is not inconsistent with this Court's precedents, including *Mt. Healthy*, in that the *Duke* court found the liability of the school district "would not run against the state." *Pennhurst*, 465 U.S. at 123 n.34. In any event, the question squarely raised in *Duke* is not properly before this Court at this time because the Ninth Circuit decision did consider both the legal and practical effect a money judgment would have against Petitioner CCSD. The Ninth Circuit properly determined any liability against Petitioner CCSD "would not run against the state."

Petitioner CCSD is arguing for further "clarity" on a test that, under any interpretation they put forward, as demonstrated above, finds them not entitled to Eleventh Amendment immunity. Consistent with this Court's precedents and other circuits, Petitioner CCSD is a political subdivision of the State of Nevada. There is no reason justifying a grant of Petitioner CCSD's petition for a writ of certiorari by this Court.

CONCLUSION

For the reasons set forth herein, the petition for a writ of certiorari should be denied.

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